Supreme Court, U.S.
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No. 93-173

IN THE

# Supreme Court of the United States

OCTOBER, 1993 TERM

WILLIAM DWAINE ELLIOTT
*Petitioner,*

v.

ADMINISTRATOR, UNITED STATES
DEPARTMENT OF AGRICULTURE,
*Respondent.*

**Petition for Writ of Certiorari**
**To the United States Court of Appeals**
**For the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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81 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Was it error to not apply the Rule of Lenity since the Statute in question contains both criminal and civil sanctions?

2. Was Petitioner denied constitutional due process since he was disqualified under Section 1825.(c) of the Statute without being provided the additional proceedings specified therein?

3. Was it error to hold that Section 1824.(2)(B) of the Act was violated even though there was no evidence whatsoever relating to some of the elements of the alleged violations?

4. Was it error to uphold Respondent's definition of the word "entering" as used in Section 1824.(2)(b) of the Act.

5 Was it error to hold that Sections 1824.(2)(b) and 1825.(d)(5) of the Act are not unconstitutionally vague?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, **WILLIAM DWAINE ELLIOTT,** respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

## REFERENCE TO REPORTS OF OPINIONS

In addition to the published opinion of the United States Court of Appeals for the Fourth Circuit, decided March 30, 1993, (which is sought to be reviewed by this Honorable Court by this Petition) the following opinions were rendered in this case:

(1) On October 11, 1991, Decision and Order by the Honorable USDA Administrative Law Judge James W. Hunt (copy included in Appendix); and

(2) On May 14, 1992, Decision and Order by the Honorable USDA Judicial Officer, Donald A. Campbell (copy included in Appendix).

## STATEMENT OF JURISDICTION

Petitioner respectfully requests this Honorable Court to review the opinion of the United States Court of Appeals for the Fourth Circuit decided on March 30, 1993, pursuant jurisdiction vested therein by 28 U.S.C.A. §§ 1254(1) (West Supp. 1992); and Rule 10.1.(a) and (c) of the Supreme Court Rules.

In this case, Petitioner filed in the U.S. Court of Appeals, a Petition for Rehearing on April 13, 1993. An Order denying the Petition for Rehearing was filed April 26, 1993.

## CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the following constitutional provisions, statutes and regulations. (The text of which are set forth in the appendix hereto.)

(a) The following provisions of The Constitution of the United States:

(1) U.S. Const. Amend. V.

(2) Art. I. § 9, cl.3

(b) The following Statute:

(1) The Horse Protection Act (15 U.S.C. 1821-1831)

(c) The following regulations:

(1) 9 CFR 1120(2)(ii)

(2) 9 CFR 11.4(a)

## STATEMENT OF THE CASE

This case is a consolidation of two disciplinary proceedings initiated against the Petitioner by Respondent which alleged three separate (yet essentially identical) violations of Section 1824.(2)(B) of the Horse Protection Act which, (paraphrased in relevant part) "prohibits the entering of a horse in a horse show, for purposes of showing, a horse that is sore" (the term "sore" is precisely defined in the Act). Respondent sought civil sanctions against Petitioner, even though the Act contains both civil and criminal sanctions.

The evidence established and it was stipulated by the parties, that on all three occasions, Petitioner had "entered" (i.e. completed the entry blanks and paid the entry fee) the horses on dates that preceded and was different than the dates of the horse shows. The evidence further established that, just prior to the show, the horses were presented by Petitioner for examination by two Respondent Veterinarians who subjectively concluded that the horses were "sore" as defined by the Act. Administrative Law Judge Hunt dismissed the complaints because there was no evidence the horses were "sore when entered", since the examinations were on dates different than the dates "entered". Respondent appealed to Respondent's

Judicial Officer Campbell, who reversed the holding and held the word "entering", as used in the Act, means a "continuing process, not an event, and includes everything one does to prepare a horse to be shown in a horse show". Petitioner then appealed to the United States Court of Appeals for the Fourth Circuit pursuant jurisdiction vested therein by Section 6.(b)(2) of The Horse Protection Act (15 U.S.C. 1825). The Court upheld Respondent's Judicial Officer Campbell's decision and assessed a civil penalty of six thousand dollars ($6,000.00) and; without further proceedings and in the same order, disqualified Petitioner from showing, exhibiting, or entering any horse in any horse show, exhibition or auction for fifteen (15) years.

It is important to note that several issues raised by Petitioner throughout the proceedings, have never been satisfactorily addressed by any forum.

## ARGUMENT

This Honorable United States Supreme Court should exercise its power of supervision in this case, since The United States Court of Appeals for the Fourth Circuit has rendered a decision which conflicts with a decision of this court in that they refused to apply the Rule of Lenity as established in *Crandon v. United States*, 110 S.Ct. 997(1990) when resolving the meaning of various provisions of the Statute and in particular, the word "entering" as used in Section 1824.(2)(B) of the Act. Petitioner wishes to emphasize the Act contains both *CRIMINAL and CIVIL* sanction provisions. The Court of Appeals mistakenly applied the rule that allows an administrative agency's interpretation of a *CIVIL* statute to prevail, as established in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* (467 U.S.837(1984), (See also, *Yellow Bus Lines, Inc. v. Drivers, et al.* (913 F.2d 948[1990]); (and Petitioner avers, they should have followed the *Crandon* rule). (emphasis added).

The Horse Protection Act, as well as the related regulations contain no definitions or guidelines for two important terms used in the Act. Both terms are entirely subjective and thus, open to various interpretations. The Act therefore fails to adequately warn of just what conduct and when such conduct, is prohibited and therefore violates the law established by *U.S. v. Harris*, 347 U.S. 612([1954]).

The decision in this case defines the word "entering" in a vague, general and varying way which is also contrary to the plain meaning of the term as used in the horse show community and industry. Petitioner is therefore denied due process of law.

The decision in this case found that Petitioner had violated § 1824.(2)(B) of the Act even though Respondent failed or neglected to present any evidence whatsoever relating to three elements of the alleged violations as set forth in the statute and as alleged in the complaints. There was no evidence relating to the following:

(1) the "for the purpose of showing" element of the offense (See 15 U.S.C. 1824 5.[2][B]);

(2) that the horse(s) would suffer pain "while walking, trotting or otherwise moving" (See 15 U.S.C. 1821,2.[3]); and

(3) that the horse(s) were "abnormally sensitive" (See 15 U.S.C.1825,6.[d][5]).

The questions presented for review in this case involve important issues of federal law that have not been, but should be resolved by this Court as they affect the lives of everyone involved with the Tennessee Walking Horse (and other breeds) industry which is a multi-million dollar industry throughout more than ten (10) states. The livelihood of

Petitioner, as well as the livelihood of many professional trainers of these animals are being denied them by arbitrary rules and actions of the USDA without due process of law in that the accessed civil penalty in this case (and which is typical throughout the industry) includes a fifteen (15) years suspension even though Petitioner has not been provided the additional due process rights specifically provided to him by § 1825.(c) of The Horse Protection Act.

Respectfully submitted, this the _____ day of _____, 1993.

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# APPENDIX

PUBLISHED

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

WILLIAM DWAINE ELLIOTT,

*Petitioner,*

v.

ADMINISTRATOR, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA,

**No. 92-1662**

*Respondents.*

On petition for Review of an Order of the United States Department of Agriculture.
(90-20-HPA, 91-122-HPA)

Argued: February 2, 1993

Decided: March 30, 1993

Before HAMILTON and LUTTIG, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

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Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Luttig and Senior Judge Ward joined.

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## COUNSEL

**ARGUED:** Philip Leroy Whitson, Charlotte, North Carolina, for Petitioner. Leslie Karen Lagomarcino, Office of General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents. **ON BRIEF;** James Michael Kelly, Associate General Counsel, Raymond W. Fullerton, Assistant General Counsel, Margaret M. Brienholt, Deputy Assistant General Counsel, Office of General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents.

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## OPINION

HAMILTON, Circuit Judge:

William D. Elliott[1] appeals the decision of the Secretary of the United States Department of Agriculture (Secretary) that he violated § 5(2)(B) (codified at 15 U.S.C. § 1824(2)(B))[2] of the Horse Protection Act. 84 Stat. 1404 (1970) (codified as amended at 15 U.S.C. §§ 1821 through 1831) (the Act), by entering on three separate occasions, for purposes of showing, Tennessee Walking Horses (Walkers) which were "sore" within the meaning of the Act.[3]

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[1] The other defendants entered into consent agreements with the Secretary prior to the administrative hearing.

[2] 15 U.S.C. § 1824(2) prohibits:

> The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

[3] In general terms, a horse is sore when it has received deliberate treatment that causes the horse to experience discomfort in its forelimbs when it walks. The purpose of such treatment is to force the horse, because of the discomfort, to simulate the distinctive quick high-step of a properly trained champion Walker. This practice is prohibited by the Act.

> More specifically, 15 U.S.C. § 1821 defines "sore" in the following manner:
>
> As used in this chapter unless the context otherwise requires:
>
> (3) The term "sore" when used to describe a horse means that —
>
> (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
>
> (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
>
> (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

On the complaint of the Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA), a hearing was held before an Administrative Law Judge (ALJ). The ALJ found in favor of Elliott on the grounds that the Act did not prohibit a horse from being "sore" at the time the three Walkers were inspected by USDA veterinarians and found to be "sore." The APHIS appealed to the Judicial Officer (JO) of the USDA who reversed the decision of the ALJ and found that Elliott had violated the Act. The decision of the JO thus became the final decision of the Secretary.

Elliott appeals, in part, on the grounds that: (1) the Secretary erred in interpreting the Act, (2) the Act was unconstitutionally vague, and (3) the Secretary improperly relied upon an evidentiary presumption.

We find no reversible error in the decision of the Secretary and, accordingly, his decision is affirmed.

On June 16, 1988, Elliott, a trainer of Walkers, paid the fee to enter "Mark's Ebony Ace" in the East Tennessee Walking Horse Classic at Gray, Tennessee. The next day, Elliott presented the horse to the Designated Qualified Person (DQP)[4] for inspection.

Dr. L.W. Critchfield, a USDA veterinarian, testified that he observed the horse during the DQP's inspection and noted that the horse: (1) exhibited pain response to the DQP's palpation of the horse's forelimbs; (2) was standing in a tucked position, with

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and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given.

[4] A DQP is employed by show management to inspect horses and determine if they are "sore". Management employs these individuals because it may be held liable under the Act if a "sore" horse is shown and a DQP was not utilized. 15 U.S.C. § 1824(3)

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unusual facial expression; and (3) exhibited other body signs of discomfort. Dr. Critchfield then inspected the horse himself, palpating various locations on the horse's front feet and lower legs while observing the horse's reaction. Mark's Ebony Ace exhibited strong pain responses during Dr. Critchfield's examination. Dr. Critchfield's report on the examination states that the horse stood in a manner which indicated it was in pain, and, upon palpation, reflexively tightened its abdominal muscles, strongly tried to move its leg away, shuffled its rear feet forward, reared upward, and then sagged back on its hindquarters. Dr. Critchfield testified at the hearing that such pain responses indicated that "something was done to the horse [to cause the pain]," (J.A. 72) and that this pain was not caused by other potential causes such as infection, "a stone bruise," or "founder." (J.A. 74).

Another USDA veterinarian, Dr. George Clawson, before learning of Dr. Critchfield's conclusion and without seeing his examination, independently examined Mark's Ebony Ace and got the same strong pain responses upon palpation of the front legs. Both doctors separately concluded that the horse was indeed "sore" as defined by the Act.

On June 8, 1989, Elliott paid the fee to enter "Delight's Big Boy" in a show in Dallas, North Carolina. Elliott's employee presented the horse for its inspection on June 10. The DQP first examined the horse and determined it to be "sore." USDA veterinarians Dr. David Kelly and Dr. William J. Martin independently examined the horse by palpating and examining for hair loss, tendon structure, lesions, or discoloration. Dr. Martin noted:

> the skin of the [lower leg] appeared bright pink similar to a fair skinned individual who is sun burned. The hair coat was very sparse indicating, in my opinion, excessive wear by the use of action devices.... The posterior [lower leg] of the right forefoot was similarly colored and had hair loss identical to the left forefoot.

(Affidavit, J.A. 251). Dr. Martin further testified that the horse experienced extreme pain in both forelimbs and suffered from inflammation of the muscles. Dr. Kelly testified that the presence of pain in both of the horse's front legs was not the result of some type of accidental injury. Each veterinarian independently found the horse to be "sore" as the result of action devices or caustic chemicals.

On August 6, 1990, Elliott paid the fee to enter "This is It" in the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee. Elliott presented the horse for inspection on August 24, 1990. Dr. Clawson observed the horse react as if in pain during the DQP's examination. The DQP rejected the horse as "sore" on both front feet. Dr. Clawson conducted an independent examination and noted that the horse exhibited pain responses to his palpation. Dr. Critchfield also noted "extreme pain" responses and both doctors concurred in the conclusion that the horse was "sore." Dr. Critchfield testified that such a reaction indicated that the horse was deliberately treated to cause the pain.

An administrative proceeding was held on January 31, 1990 on the three alleged violations of 15 U.S.C. § 1824(2)(B), *i.e.* "entering for the purposes of showing... any horse which is sore...." Elliott admitted that he was the horses' trainer and that he "paid the entry fee and entered the horses in their respective horse shows." (Appellant's Brief 4). He denied that the horses were "sore" when entered or that it was proven they were "sore" at all. Elliott also argued that the Act was unconstitutional because it discriminated against owners and trainers of Walkers, because "entering" is vague, and because the Act creates a presumption that a horse is "sore" when the two forelegs are "abnormally sensitive."

The ALJ found that testimony established that the three horses were "sore" within the meaning of the Act when examined by the USDA veterinarians. He found that at the time of inspection the horses had already been "entered" because the respective

horses were registered at that point for the show and that the Act did not cover the time period after entering and before showing. The ALJ, therefore, dismissed the complaint.

The APHIS appealed the decision to the JO. The JO determined that "entering" a horse included all those activities required to be completed before the horse could be shown, including inspection, not just registration. The JO stated:

> the entering process is [not] somehow completed at a point certain sometime after the horse is signed in for the show, on the one hand, and the pre-show clearing by the Show-Steward or Veterinarian, on the other. To the contrary, the entering of the horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited.

*In re Elliott*, No. 90-20, slip op. (Dept. Agric. May 14, 1992). The JO reasoned that including the initial sign-up in the entering process, but excluding the pre-show clearance examination would provide a "window-of-opportunity" to make a horse "sore," and neither the plain language of the Act allows this result nor could Congress have intended this result. The JO also rejected Elliott's arguments that the Act violated the Constitution because it was vague, discriminatory, or because it utilized a rebuttable presumption that a horse is "sore" when the horse is "abnormally sensitive" in both forelimbs.[5]

The JO imposed upon Elliott the maximum civil penalty of $2,000 for each of the three violations and a disqualification period of five years for each violation to run consecutively. This appeal followed.

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[5] 15 U.S.C. § 1825(d)(5) provides:

In any civil or criminal action to enforce this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hind limbs.

## II

A court's standard of review of agency decisions is to determine if the agency action is consistent with the authority granted by Congress and is supported by substantial evidence. *See, e.g., Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474 (1951). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence is more than a scintilla but less than a preponderance. *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). Even if we were to reach a different conclusion from the agency, the agency's reasonable choice, supported by substantial evidence, may not be overturned. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

With respect to an agency's interpretation of a statute, if a statute is plain on its face, there is no room for a contrary agency interpretation. When we review an agency's interpretation of a statute which is not plain on its face, we look first to the intent of Congress. If that intent is clear, then we and the agency are bound to give effect to it. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress explicitly leaves a gap in the legislation, then the agency has authority to fill that gap and the agency is entitled to deference on the question, unless the agency's action is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. If, however, the statute is merely silent or ambiguous on a particular matter and no intent on the part of Congress can be discerned, the court is not bound to give effect to an unreasonable agency interpretation. *Id.*

## III

Congress enacted the Horse Protection Act to end the practice of deliberately making Walkers "sore" for the purpose of altering their natural gait and improving their performance at horse shows. When the front limbs of a horse have been deliberately made

"sore," usually by using chains or chemicals, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the distinctive high-stepping gait of a champion Walker]." H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal "sore" gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse "sore" is not a necessary element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983).

Violators of the Act are subject to civil and criminal sanctions. A criminal penalty of not more than $3,000 and imprisonment for up to one year may be imposed for each knowing violation of the Act; and each subsequent violation can result in a penalty of $5,000 and imprisonment for up to two years. 15 U.S.C. §§ 1825(a)(1), (2)(A). Civil penalties can include disqualification from association with horse shows and penalties of up to $2,000 for each violation. Disqualification is for a period of not less than one year for an initial violation and not less than five years for any subsequent violation.[6]

## IV

### A

Elliott asserts that "entering," as used in 15 U.S.C. § 1824(2)(B), constitutes only registration of the horse and payment of the entry fee. The time period between such time and the actual show, he asserts, is not included within the meaning of "entering." We cannot agree that "entering" means simply paying the fee and registering

[6] Prior to the three incidents in the case *sub judice*, Elliott had been found in violation of the Act and was, therefore, subject to the increased suspension period.

the horse for showing, which oftentimes is done by mail without the requirement for presenting the horse. Inspection of the horse is a prerequisite to the horse being eligible to show and the horse is not fully qualified to show until the inspection is passed. The plain meaning of "entering" a horse in a show would seem to encompass all the requirements—including inspection—and the time necessary to complete those requirements.

Even if we were to agree, however, that the plain meaning of the Act is not clear, the USDA's interpretation is entirely reasonable and consistent with Congressional intent and thus must be upheld. We think it stretches credulity to argue that Congress intended only to prohibit a horse being "sore" at registration or when being shown and between that time the horse is permitted to be "sore." The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse "sore." Congress stated that its purpose was to "make it impossible for persons to show sored horses in nearly all horse shows." *See* H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Elliott's reading of the Act would defeat this purpose by effectively making meaningless pre-showing inspections which are not contemporaneous with the registration and payment of the entry fee. We conclude that the USDA's interpretation of "entering" is reasonable and not contrary to Congressional intent and thus we are bound to give it effect. *Chevron U.S.A.*, 467 U.S. at 842.

B

Elliott also argues that the Act is vague and thus unconstitutional. A statute is not void for vagueness if it: (1) establishes "minimal guidelines to govern law enforcement," and (2) gives reasonable notice of the proscribed conduct. *Kolcander v. Lawson*, 461 U.S. 352, 358 (1983). A law is considered vague if "a person of normal intelligence must guess at its meaning and differ as to

its application." *Connally v. General Construction*, 269 U.S. 385, 391 (1926). A person of reasonable intelligence should have understood that the Act prohibits a trainer from making his horses "sore." § 1821(3) plainly prohibits any practice which may "result [or] can reasonably be expected to [cause] physical pain, distress, inflammation or lameness...." Such explicit language clearly warns against the practice of making horses "sore," however it may be accomplished, and thus it does not violate due process.

Elliott also argues that the Act is vague because it fails to establish uniform standards for examination and diagnoses by USDA veterinarians. In other words, he complains that the determination of "sore" depends on the subjective conclusion of the USDA veterinarian. In fact, the fact-finder makes the determination as to whether or not a horse was "sore". The USDA veterinarians merely provided evidence, through their diagnosis, as to whether or not this is the case. Their findings are subject to the same scrutiny as any other evidence. As one court ably put it:

> [A]ccepting that the opinions of the examining veterinarians are subjective to a degree, that subjectivity is no more than that inherently present whenever expert opinion is used for evidentiary purposes in adjudicative proceedings. The evidentiary use of expert opinions, in particular those supported by live testimony and subject to the defendants' cross-examination, does not violate the due process clause. *See e.g., Richardson v. Perales*, 402 U.S. 389, 408 (1971); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 339-340 (1932).

*Fleming v. USDA*, 713 F.2d 179, 186 (6th Cir. 1983).

C

Elliott further contends that the ALJ impermissibly relied on the statutory presumption that if a horse is "abnormally sensitive" it is

deemed to be "sore." 15 U.S.C. § 1825(d)(5). Elliott argues that "abnormally sensitive" is so vague as to be violative of due process and that equating "abnormal sensitivity" to deliberate treatment to render a horse "sore" is an unwarranted and unsupported presumption. We find it unnecessary to consider the presumption established by § 1825(d)(5) in light of the direct evidence that the horses were "sore." The examining veterinarians did not simply conclude that the horses were abnormally sensitive in two limbs and, therefore, were "sore." Each veterinarian testified to the effect that the three horses plainly experienced a high degree of pain upon palpation of their forelimbs, demonstrated by the horses' immediate and reflexive pulling away from the palpation, rearing up and sagging down on the hindquarters, and instinctively cinching up the abdominal muscles. The diagnosis was not based upon mere abnormal sensitivity. The veterinarians specifically opined that the pain responses were not the result of some other type of injury but rather were deliberately inflicted. In other words, the horses, when inspected, were "sore" within the meaning of the Act. As previously discussed, the veterinarians noted other conditions indicating the horses were "sore": (1) hair loss which indicated the use of action devices or caustic chemicals; (2) inflammation in the forelimbs; and (3) unusual stance, movement and expression. The testimony was in the form of professional opinions linking cause and effect, not simple reliance on a statutory presumption. Although the ALJ cited the presumption, his opinion clearly shows he determined, based on the evidence presented, that the animals were "sore" on the days they were "entered." Unquestionably, substantial evidence supports those conclusions.[7] Where there is a factual finding that a horse was "sore", even in the absence of the presumption, it is irrelevant that

[7]Although Elliott presented the testimony of three lay persons contradicting the testimony of the veterinarians, the ALJ was entitled to credit the testimony of the veterinarians.

V

Elliott raises a number of other assignments of error, and our review of the briefs and consideration of the arguments of the parties have revealed that these remaining points of error are without merit. Accordingly, for the reasons stated herein, the decision of the Secretary is affirmed.

*AFFIRMED*

## UNITED STATES DEPARTMENT OF AGRICULTURE
## BEFORE THE SECRETARY OF AGRICULTURE

| | |
|---|---|
| In re: | : Consolidated dockets: |
| | : HPA Docket No. 90-20/ |
| William Dwaine Elliott, | : HPA Docket No. 91-122 |
| Bernice Elliott, David D. Smith, | : |
| and Mr. and Mrs. Farrell Hughes/ | : |
| William Dwaine Elliott and | : |
| Scott Lambert, | : |
| *Respondents* | : |

## DECISION AND ORDER

This is a disciplinary proceeding under the Horse Protection Act ("Act"), as amended (15 U.S.C. § 1821, *et. seq.*), instituted by complaints filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA").

The complaints, which were consolidated for purposes of the hearing, allege that respondent, William Dwaine Elliott[1], violated the Act on three occasions by entering horses in shows while the animals were sore for purposes of showing or exhibiting them.

The hearing was held in Charlotte, North Carolina, on June 5 and 6, 1991. Complainant was represented by J. LaVonne Martin, Esq. Respondent was represented by Philip L. Whitson, Esq. Both parties filed post-hearing briefs which have been considered, together with the record in this case.

The complaint in HPA Docket No. 90-20 alleges that respondent was the trainer of a horse known as "Delight's Big Toy" and entered the horse while sore on June 10, 1989, at a horse show for the purpose of showing or exhibiting the horse, and was the trainer of a horse known as "Mark's Ebony Ace" and entered the

[1]Complainant and respondents Bernice Elliott, David D. Smith, Mr. and Mrs. Farrell Hughes and Scott Lambert entered into consent decisions prior to the hearing. This decision therefore does not apply to them.

horse while sore on June 17, 1988, for the purpose of showing or exhibiting the horse. The complaint in HPA Docket No. 91-122 alleges that respondent was the trainer of a horse known as "This Is It" and entered the horse while sore on August 24, 1990, at a horse show for the purpose of showing or exhibiting the horse. The complaints allege that respondent's action constitutes violations of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

Respondent admitted in his answer that he was the trainer of the horses in question. Complainant and respondent also stipulated at the hearing that (a) on June 16, 1988, respondent "entered and paid the entry fee" at the East Tennessee Walking Horse Classic for "Mark's Ebony Ace" for the purpose of exhibiting the horse at the show, and that on June 17, 1988, respondent presented the horse for pre-show inspection by the designated qualified person ("DQP"), (b) on August 6, 1990, respondent "entered and paid the entry fee" at the Tennessee Walking Horse National Celebration for "This Is It" for the purpose of exhibiting the horse at the show, and that on August 24, 1990, respondent presented the horse for inspection by the DQP, and (c) on June 8, 1989, respondent "paid the entry fee and entered" "Delight"s Big Toy" at the Gaston County Charity Horse Show for the purpose of exhibiting the horse at the show, and that the horse was presented for pre-show inspection on June 10, 1989.

**Facts**

On June 17, 1988, APHIS veterinarians L.S. Critchfield and George Clawson examined "Mark's Ebony Ace" at the East Tennessee Walking Horse Classic in Gray, Tennessee. Critchfield and Clawson had received special training in examining horses and had had extensive experiences in the process. They concluded after independently examining "Mark's Ebony Ace" and palpating its legs that both of the horse's front pasterns were sore. The reports on their examinations are set forth in detail in their affidavits in

complainant's exhibits 2 and 3. Before these veterinarians examined the horse, it had been examined by a DQP, Ronnie Slack, who decided that the horse was not sore. However, he re-examined the horse, changed his decision, and turned the horse down for showing.

Respondent testified that he had examined the horse and that it was not in pain. He also questioned the adequacy of Critchfield's and Clawson's examination techniques. Respondent said that "Mark's Ebony Ace" was a nervous and over-sensitive horse and that such a horse can act as though it is in pain. He testified that Critchfield and Clawson did not give the horse time to settle down before examining it. He further testified that Slack's decision to turn the horse down for showing was reversed by the show's committee.

Drs. Critchfield and Clawson testified that they are familiar with "foolish" horses and that they can tell the difference between the reactions of a foolish horse and a sore horse like "Mark's Ebony Ace." Dr. Critchfield also testified that it is possible to find a horse sore one day and not find it sore on the following day. he said that this could be due to a person using ice, steroids, or drugs on the horse to mask the pain. He also said it could be due to "naturally healing effects." (Tr. 40-41.)

On August 24, 1990, Drs. Critchfield and Clawson examined "This Is It" at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. After conducting their independent examinations, which are detailed in complainant's exhibits 4-6, they found that the horse demonstrated a strong pain response when both front pasterns were palpated. They concluded from this and their examination that the horse was sore. The DQP who had examined the horse also found that the horse was sore.

Respondent testified that "This Is It" was a nervous and sensitive horse that was easily scared. He presented two witnesses,

J.R. Honeycutt, a farrier, and Tommy Blackwell, a horse trainer, who, although experienced with Tennessee Walking Horses, were not veterinarians. They testified that "This Is It" was "unpredictable", "ornery", did not like to be touched and sometimes had to be sedated when shod.

On June 10, 1989, APHIS veterinarians David Kelley and William J. Martin independently examined "Delight's Big Toy" at the Gaston County Charity Horse Show in Dallas, North Carolina. Their examinations are summarized in complainant's exhibits 7-9. They both detected pain response when both the front and back pasterns of both forelimbs were palpated. Dr. Martin also observed that the pastern skin area appeared "bright pink" with a sparse hair coat indicating, in his opinion, that a chemical blistering agent had been used in conjunction with action devices. Both veterinarians concluded that the horse was sore.

Respondent testified that "Delight's Big Toy" was an old horse with a low pain threshold. He said the horse's skin appeared pink because he used brown baby powder on the horse and that the powder changed color because of heat and sweat. Honeycutt and Blackwell also testified that they had palpated the horse and that they did not observe that the horse was in pain.

## Discussion

Complainant contends that the evidence shows that the horses were sore when examined. Complainant further contends that, notwithstanding the parties' stipulation that each horse was "entered" in the show on a date prior to the horse's examination, an examination is nevertheless an integral part of the "process" of entering a horse in a show and that a horse is not finally "entered" in a show until after its pre-show inspection. Complainant argues that since the horses were sore when examined they were therefore sore when entered.

Respondent contends that the complaints should be dismissed on the grounds that:

1. The Horse Protection Act is unconstitutional.
2. The Act is discriminatorily enforced against owners and trainers of Tennessee Walking Horses.
3. Complainant has failed to prove that the horses were sore.
4. Complainant has failed to prove that the horses were sore when they were "entered" in their respective shows.

Section 1821(3) of the Act (15 U.S.C. § 1821(3)) provides that:

(3) The term "sore" when used to describe a horse means that –

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person

> of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

Section 1825(d)(5) of the Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore:

> (5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

The Act prohibits not only the showing or exhibiting of a sore horse, but also "...the entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore..." (15 U.S.C. § 1824(2)(B)).

Respondent contends that Section 1824(2)(B) of the Act is vague and therefore violates his constitutional right of due process. In his argument, however, respondent's quarrel is with complainant's proposed interpretation of the Act, rather than with the wording of the Act itself. Complainant's interpretation will be covered later in this discussion. As for the wording of the Act, it is quite explicit in the conduct it prohibits. It is clearly not unconstitutionally vague. Section 1825(d)(5) is likewise not unconstitutional because, although it establishes a presumption of soreness, it is not an irrebuttable presumption. *David Landrum and Dorothy Halsey v. John Block*, Civil Action No. 81-1035, M.D. Tenn., 40 Agric. Dec. 922 (1981).

As for respondent's contention that the Act is discriminatorily enforced against owners and trainers of Tennessee Walking Horses, the legislative history of the Act reflects the concern of Congress with the soring of Tennessee Walking Horses and that the Act was designed specifically to protect

this type of horse. Enforcement of the Act is therefore primarily directed at owners and trainers of this breed. *Pat Sparkman, et al.*, 50 Agric. Dec. 602 (1991).

Respondent's contention that the horses were not sore when examined is also without merit. In each instance, two veterinarians testified credibly that they examined the horse involved and concluded that the horse was sore. These findings, based on recognized and accepted palpation techniques to determine whether a horse is sore (see e.g. *Larry E. Edwards, et al.*, 49 Agric. Dec. 188, 204 (1990)), were sufficient under the Act to raise a rebuttable presumption that all three of the horses involved in this matter were sore when examined. *Jackie McConnell, et al.*, 44 Agric. Dec. 712, 721 (1985). For rebuttal respondent offered his own opinion and the opinion of other laymen experienced in handling walking horses that the horses were not sore. The opinion of laymen, even that of a DQP, is insufficient to outweigh the credible testimony of a veterinarian. *Eldon Stamper, et al.*, 42 Agric. Dec. 20, 50 (1983). Complainant has therefore met its burden by the required preponderance of the evidence to establish that the three horses involved in this matter were sore on the date they were examined by APHIS veterinarians.

Respondent, however, also makes the argument that, even though the horses may have been sore when examined, this does not necessarily prove that the horses were sore when they were entered in the show. Complainant, on the other hand, contends that the process of "entering" a horse is a continuing process which is not completed until a horse is presented for a pre-show inspection. The authority cited for this proposition is *Mary C. Baird, et al.*, 48 Agric. Dec. 906 (1989) wherein the horse in that case was apparently examined and found to be sore on the same day it was entered in the

case (number 4) states that the pre-show inspection was "the final step of the entering process." An examination of that decision to determine the basis for this finding shows only that it was based on an allegation in the complaint which was admitted in the answer by the respondent. Respondent was not represented by an attorney. The matter otherwise does not appear to have been a litigated issue. In these circumstances, *Baird* is a dubious precedent for the proposition that a pre-show inspection is part of the entry process.

A case more directly in point is *Billy Gray, et al.*, 41 Agric. Dec. 253 (1982), in which the Judicial Officer, who makes the final decision for the Secretary in these cases, held that the process of entering a horse is completed before the horse is inspected by the show steward or veterinarian. In view of this ruling, I find that the horses involved in the matter here were entered in their respective shows before they received their pre-show inspections.[2] Thus, the fact that they were found to be sore when inspected does not necessarily show that the horses were sore when they were entered in the show.

Nevertheless, in some circumstances it might be proper to infer from a finding that a horse was sore at the pre-show examination, that the horse was sore when it was entered. Such an inference, for example, might be appropriate if the examination is close in time to the horse's entry, as in *Baird, supra*, when the examination was apparently performed on the same day as, and probably within a few hours of, the horse's entry.

However, the greater the time between the horse's entry and its examination the weaker the inference. It has been held, for instance, that a horse may be found not sore one day, but

[2]The parties, as noted before, also stipulated that the horses had been "entered" in their respective shows on dates prior to their inspections. The Judicial Officer has held that parties are bound by their stipulations. *Billy Gray, supra*, at 254.

found sore two days later. *Dude Crowder*, 40 Agric. Dec 33 (1981). And, conversely, "[i]t is possible to find extreme pain response in a horse one day and none the next, by means of various treatments or methods which might not be apparent to an examining veterinarian the next morning." *Richard L. Thornton, et al.*, 41 Agric. Dec. 870, 890 (1982).

Thus, an inference cannot be drawn that a horse was sore on any particular day simply on the basis of evidence showing *only* that it was sore when inspected the following day. On the other hand, it is conceivable that a finding could be made that a horse was sore a day or two before its inspection based on evidence or credible testimony of an examining veterinarian to the effect that the horse was not only sore when examined, but that the nature of the soring indicated that the horse's soring preexisted the examination.

In the instant case, however, there is no substantial evidence showing that the horses were sore before their inspection. On the contrary, Dr. Critchfield, one of the examining veterinarians, testified that a horse could be sore one day and not the next. In these circumstances, I find that complainant has failed to prove by a preponderance of the evidence that the horse "Mark's Ebony Ace", examined on June 17, 1988, was sore when entered in the show on June 16, 1988; that the horse "This Is It", examined on August 24, 1990, was sore when entered in the show on August 6, 1990; and that the horse "Delight's Big Toy", examined on June 10, 1989, was sore when entered in the show on June 8, 1989.

Accordingly, the complaints will be dismissed.

## Findings of Fact

1. Respondent William Dwaine Elliott, Jr., is an individual whose mailing address is Post Office Box 147, Valdese, North Carolina 28690.

2. At all times material herein, respondent was the trainer of the horses known as "Mark's Ebony Ace", "Delight's Big Toy" and "This Is It".

3. On June 16, 1988, respondent entered "Mark's Ebony Ace" at the East Tennessee Walking Horse Classic at Gray, Tennessee.

4. On June 17, 1988, "Mark's Ebony Ace" experienced pain in both of its front feet when two APHIS veterinarians palpated them

5. On June 8, 1989, respondent entered "Delight's Big Toy" at the Gaston County Charity Show at Dallas, North Carolina.

6. On June 10, 1989, "Delight's Big Toy" experienced pain in both of its front feet when two APHIS veterinarians palpated them.

7. On August 6, 1990, respondent entered "This Is It" at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee.

8. On August 24, 1990, "This Is It" experienced pain in both of its front feet when two APHIS veterinarians palpated them.

**Conclusion of Law**

Respondent did not violate the Horse Protection Act (15 U.S.C. § 1821, *et seq.*).

## Order

The complaints are dismissed.

This decision and order will become final without further proceeding 35 days after service on the parties unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.145.

JAMES W. HUNT
Administrative Law Judge

October 11, 1991

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

| | | |
|---|---|---|
| In re: | : | HPA Docket No. 90-20 |
| William Dwaine Elliott, Bernice Elliott, David D. Smith, and Mr. and Mrs. Farrell Hughes, | : | |
| *Respondents* | : | |
| AND | | |
| In re: | : | HPA Docket No. 91-122 |
| William Dwaine Elliott and Scott Lambert, | : | |
| | : | **Decision and Order as to** |
| *Respondents* | : | **William Dwaine Elliott** |

This is a consolidated disciplinary administrative proceeding under the Horse Protection Act of 1970 (Act), as amended, 15 U.S.C. § 1821 *et seq.*, instituted by Complaints filed by the Administrator, Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA). The Complaints, which were consolidated for hearing, allege that Respondent William Dwaine Elliott[1] violated the Act on three occasions by entering horses in shows, while the horses were sore, for purposes of showing or exhibiting them. On October 11, 1991, Administrative Law Judge James W. Hunt (ALJ) filed an Initial Decision and Order in which he concluded that Complainant proved that the three horses were sore when examined immediately prior to the shows, but that the horses were "entered" one or

[1]Complainant and Respondents Bernice Elliott, David D. Smith, Mr. and Mrs. Farrell Hughes and Scott Lambert entered into Consent Decisions prior to the hearing. This Decision therefore does not apply to them.

more days before the examinations, and that Complainant failed to prove that any of these three horses were sore when they were entered.

On December 27, 1991, Complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated. 7 C.F.R. § 2.35.[2] The case was referred to the Judicial Officer for decision on February 20, 1992.

Upon a careful consideration of the record in this case, the ALJ's dismissal of the Complaints is reversed, the Initial Decision and Order is modified and included in the final Decision and Order, with a few trivial changes, and with omissions from the Initial Decision shown as dots and additions by brackets. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

## ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This is a disciplinary proceeding under the Horse Protection Act ("Act"), as amended, 15 U.S.C. § 1821, *et seq.*, instituted by complaints filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA").

The complaints, which were consolidated for purposes of the hearing, allege that respondent, William Dwaine Elliott, [footnote 1 omitted] violated the Act on three occasions by entering horses in shows while the animals were sore for purposes of showing or exhibiting them.

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940, 7 U.S.C. §§ 450c-450g, and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

The hearing was held in Charlotte, North Carolina, on June 5 and 6, 1991. Complainant was represented by J. LaVonne Martin, Esq. Respondent was represented by Philip L. Whitson, Esq. Both parties filed post-hearing briefs which have been considered, together with the record in this case.

The complaint in HPA Docket No. 90-20 alleges that respondent was the trainer of a horse known as "Delight's Big Toy" and entered the horse while sore on June 10, 1989, at a horse show for the purpose of showing or exhibiting the horse, and was the trainer of a horse known as "Mark's Ebony Ace" and entered the horse while sore on June 17, 1988, for the purpose of showing or exhibiting the horse. The complaint in HPA Docket No. 91-122 alleges that respondent was the trainer of a horse known as "This Is It" and entered the horse while sore on August 24, 1990, at a horse show for the purpose of showing or exhibiting the horse. The complaints allege that respondent's action constitutes violations of section 5(2)(B) of the Act, 15 U.S.C. § 1824(2)(B).

Respondent admitted in his answer that he was the trainer of the horses in question. Complainant and respondent also stipulated at the hearing that (a) on June 16, 1988, respondent "entered and paid the entry fee" at the East Tennessee Walking Horse Classic for "Mark's Ebony Ace" for the purpose of exhibiting the horse at the show, and that on June 17, 1988, respondent presented the horse for pre-show inspection by the designated qualified person ("DQP"), (b) on August 6, 1990, respondent "entered and paid the entry fee" at the Tennessee Walking Horse National Celebration for "This Is It" for the purpose of exhibiting the horse at the show, and that on August 24, 1990, respondent presented the horse for inspection by the DQP, and (c) on June 8, 1989, respondent "paid the entry fee and entered" "Delight's Big Toy" at the Gaston County Charity Horse Show for the purpose of exhibiting the horse at the show,

and that the horse was presented for pre-show inspection on June 10, 1989.

**Facts**

On June 17, 1988, APHIS veterinarians L.S. Critchfield and George Clawson examined "Mark's Ebony Ace" at the East Tennessee Walking Horse Classic in Gray, Tennessee. Critchfield and Clawson had received special training in examining horses and had had extensive experience in the process. They concluded after independently examining "Mark's Ebony Ace" and palpating its legs that both of the horse's front pasterns were sore. The reports on their examinations are set forth in detail in their affidavits in complainant's exhibits 2 and 3. Before these veterinarians examined the horse, it had been examined by a DQP, Ronnie Slack, who decided that the horse was not sore. However, he re-examined the horse, changed his decision, and turned the horse down for showing.

Respondent testified that he had examined the horse and that it was not in pain. He also questioned the adequacy of Critchfield's and Clawson's examination techniques. Respondent said that "Mark's Ebony Ace" was a nervous and over-sensitive horse and that such a horse can act as though it is in pain. He testified that Critchfield and Clawson did not give the horse time to settle down before examining it. He further testified that Slack's decision to turn the horse down for showing was reversed by the show's committee.

Drs. Critchfield and Clawson testified that they are familiar with "foolish" horses and that they can tell the difference between the reactions of a foolish horse and a sore horse like "Mark's Ebony Ace." Dr. Critchfield also testified that it is possible to find a horse sore one day and not find it sore on the following day. He said that this could be due to a person using ice, steroids, or drugs on the horse to mask the pain. He also said

it could be due to "naturally healing effects." (Tr. 40-41.)

On August 24, 1990, Drs. Critchfield and Clawson examined "This Is It" at the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. After conducting their independent examinations, which are detailed in complainant's exhibits 4-6, they found that the horse demonstrated a strong pain response when both front pasterns were palpated. They concluded from this and their examination that the horse was sore. The DQP who had examined the horse also found that the horse was sore.

Respondent testified that "This Is It" was a nervous and sensitive horse that was easily scared. He presented two witnesses, J.R. Honeycutt, a farrier, and Tommy Blackwell, a horse trainer, who, although experienced with Tennessee Walking Horses, were not veterinarians. They testified that "This Is It" was "unpredictable," "ornery," did not like to be touched and sometimes had to be sedated when shod.

On June 10, 1989, APHIS veterinarians David Kelley and William J. Martin independently examined "Delight's Big Toy" at the Gaston County Charity Horse Show in Dallas, North Carolina. Their examinations are summarized in complainant's exhibits 7-9. They both detected pain response when both the front and back pasterns of both forelimbs were palpated. Dr. Martin also observed that the pastern skin area appeared "bright pink" with a sparse hair coat indicating, in his opinion, that a chemical blistering agent had been used in conjunction with action devices. Both veterinarians concluded that the horse was sore.

Respondent testified that "Delight's Big Toy" was an old horse with a low pain threshold. He said the horse's skin appeared pink because he used brown baby powder on the horse and that the powder changed color because of heat and sweat. Honeycutt and Blackwell also testified that they had pal-

pated the horse and that they did not observe that the horse was in pain.

**Discussion**

Complainant contends that the evidence shows that the horses were sore when examined. Complainant further contends that, notwithstanding the parties' stipulation that each horse was "entered" in the show on a date prior to the horse's examination, an examination is nevertheless an integral part of the "process" of entering a horse in a show and that a horse is not finally "entered" in a show until after its pre-show inspection. Complainant argues that since the horses were sore when examined they were therefore sore when entered.

Respondent contends that the complains should be dismissed on the grounds that:

1. The Horse Protection Act is unconstitutional.
2. The Act is discriminatorily enforced against owners and trainers of Tennessee Walking Horses.
3. Complainant has failed to prove that the horses were sore.
4. Complainant has failed to prove that the horses were sore when they were "entered" in their respective shows.

Section 2(3) of the Act, 15 U.S.C. § 1821(3), provides that:

(3) The term "sore" when used to describe a horse means that —

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

Section 6(d)(5) of the Act creates a presumption that a horse with abnormal, bilateral sensitivity is sore (15 U.S.C. § 1825(d)(5)):

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

The Act prohibits not only the showing or exhibiting of a sore horse, but also "entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore" (15 U.S.C. § 1824(2)(B)).

Respondent contends that section 5(2)(B) of the Act is vague and therefore violates his constitutional right of due process. In his argument, however, respondent's quarrel is with complainant's proposed interpretation of the Act, rather than with the wording of the Act itself. Complainant's interpretation

will be covered later in this discussion. As for the wording of the Act, it is quite explicit in the conduct it prohibits. It is clearly not unconstitutionally vague. Section 6(d)(5) is likewise not unconstitutional because, although it establishes a presumption of soreness, it is not an irrebuttable presumption. *David Landrum and Dorothy Halsey v. John Block*, Civil Action No. 81-1035 (M.D. Tenn. June 25, 1981), [*printed in*] 40 Agric. Dec. 922 (1981).

As for respondent's contention that the Act is discriminatorily enforced against owners and trainers of Tennessee Walking Horses, the legislative history of the Act reflects the concern of Congress with the soring of Tennessee Walking Horses and that the Act was designed specifically to protect this type of horse. Enforcement of the Act is therefore primarily directed at owners and trainers of this breed. *Pat Sparkman, et al.*, 50 Agric. Dec. 602 [, 611] (1991).

Respondent's contention that the horses were not sore when examined is also without merit. In each instance, two veterinarians testified credibly that they examined the horse involved and concluded that the horse was sore. These findings, based on recognized and accepted palpation techniques to determine whether a horse is sore (see e.g. *Larry E. Edwards, et al.*, 49 Agric. Dec. 188, 204 (1990) [, *aff'd per curiam*, 946 F.2d 1549 (11th Cir. 1991) (unpublished), *cert. denied*, 122 S.Ct. 1475 (1992)], were sufficient under the Act to raise a rebuttable presumption that all three of the horses involved in this matter were sore when examined. *Jackie McConnell, et al.*, 44 Agric. Dec. 712, 721 (1985), [*vacated in part*, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order)]. For rebutt[al] respondent offered his own opinion and the pinion of other laymen experienced in handling walking horses that the horses were not sore. The opinion of laymen, even that of a DQP, is insufficient to outweigh the credible testimony of a veterinarian.

*Eldon Stamper, et al.*, 42 Agric. Dec. 20, 30 (1983) [, *aff'd*, 722 F.2d 1483 (9th Cir. 1984)]. Complainant has therefore met its burden by the required preponderance of the evidence to establish that the three horses involved in this matter were sore on the date they were examined by APHIS veterinarians.

Respondent, however, also makes the argument that, even though the horses may have been sore when examined, this does not necessarily prove that the horses were sore when they were entered in the show. Complainant, on the other hand, contends that the process of "entering" a horse is a continuing process which is not completed until a horse is presented for a pre-show inspection. The authority cited for this proposition is *Mary C. Baird, et al.*, 48 Agric. Dec. 906 [, 907] (1989) wherein the horse in that case was apparently examined and found to be sore on the same day it was entered in the show. A finding of fact (rather than a conclusion of law) in that case (number 4) states that the pre-show inspection was "the final step [in the entry] process." An examination of that decision to determine the basis for this finding shows only that it was based on an allegation in the complaint which was admitted in the answer by the respondent. Respondent was not represented by an attorney. The matter otherwise does not appear to have been a litigated issue. In these circumstances, *Baird* is a dubious precedent for the proposition that a pre-show inspection is part of the entry process. [However, subject to the above limitations, and to the fact that the Judicial Officer did not review *Baird*, the ALJ's conclusion in *Baird* is nonetheless correct that the pre-show inspection is part of the entry process.]

**Findings of Fact**

1. Respondent William Dwaine Elliott, Jr., is an individual whose mailing address is Post Office Box 147, Valdese, North Carolina 28690.

2. At all times material herein, respondent was the trainer of the horses known as "Mark's Ebony Ac[e]", "Delight's Big Toy" and "This Is It".

3. On June 16, 1988, respondent entered "Mark's Ebony Ace" at the East Tennessee Walking Horse Classic at Gray, Tennessee.

4. On June 17, 1988, "Mark's Ebony Ace" experienced pain in both of its front feet when two APHIS veterinarians palpated them

5. On June 8, 1989, respondent entered "Delight's Big Toy" at the Gaston County Charity Show at Dallas, North Carolina.

6. On June 10, 1989, "Delight's Big Toy" experienced pain in both of its front feet when two APHIS veterinarians palpated them.

7. On August 6, 1990, respondent entered "This Is It" at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee.

8. On August 24, 1990, "This Is It" experienced pain in both of its front feet when two APHIS veterinarians palpated them.

## ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ decided that Complainant proved by a preponderance of the evidence that the three horses were sore when examined immediately prior to the shows, which was one or more days after the initial acts of entering had occurred, but that Complainant failed to prove that the horses were sore when the initial acts of entering occurred. However, there is much more than a preponderance of the evidence that the Respondent violated the Act, as alleged in the Complaints, which is all that is

required.[3] Actually, the ALJ agreed with Complainant's case up to Complainant's position that the "entering" of a horse in a show is a continuing process. The ALJ reasoned (incorrectly) that "entry" is an isolated event, and went about relating a horse's soreness to a point in time the ALJ called "entry."

Thus, this case turns upon the meaning of the term "entering," as used in the Horse Protection Act of 1970, which provides (15 U.S.C. § 1824) (emphasis added):

> **§ 1824. Unlawful acts**
>
> The following conduct is prohibited:
>
> (1)The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction, except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) *entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which* is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and

[3] See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n. 5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

(D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

The ALJ cited *In re Gray*, 41 Agric. Dec. 253, 255 (1982), stating that the Judicial Officer held in that case that "the *process* of entering a horse *is completed* before the horse is inspected by the show steward or veterinarian." (Initial Decision at 8 (emphasis added to highlight the ALJ's changes)).

However, the words I actually used in *Gray* are "the act of entering the horse occurs before the horse is cleared by the Show Steward or Veterinarian." (*Gray, supra*, at 255.) Nowhere in *Gray* can be found support for the proposition that the entering process is somehow completed at a point certain sometime after the horse is signed in for the show, on the one hand, and the pre-show clearing by the Show Steward or Veterinarian, on the other. To the contrary, the entering of a horse is a continuing process, not an event, and includes all activities required to be completed before a horse can actually be shown or exhibited.

Common sense and basic statutory construction clearly require that there be no period of time from sign-up to pre-show clearance, which is not part of the "entering" process. The wording of the statute, quoted above, gives no window of opportunity for soring a horse without recourse to the statute between signing and pre-show clearance. Such a situation would clearly violate the intent of the statute.

Moreover, under the ALJ's interpretation, how would one determine when the "entering" process has been completed, leaving the horse fair game for soring? A holding that the "entering" of a horse lasts only for the day of initial sign-up is as arbitrary as saying, for instance, "until the ink is dry on the form," or "until close of business," or until "midnight that day of sign-up." I find nothing in the statute to support this sort of holding.

Common sense and the usual meaning of terms go with the letter and spirit of the statute. One says, "is your horse an entrant?" Or, "is your horse entered in the show?" These terms address a *status*, and I find that this status emanates from a process, which in common parlance is known as "entering." Entering is a bundle of activities which the Congress in its wisdom determined *was different from the actual showing and exhibition of the animal*. The ALJ expressed it in the Initial Decision, as follows (Initial Decision at 6):

> The Act prohibits not only the showing or exhibiting of a sore horse, but also "entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore" (15 U.S.C. § 1824(2)(B)).

Thus, I conclude that the ALJ in this case has done here what I found the ALJ had done in *Gray*, as follows (*Gray, supra*, at 254):

> Judge Liebert's construction of the terms is a strained and unnatural construction contrary to the plain meaning of the terms, which would undermine the legislative purpose to end the cruel and destructive practice of soring Tennessee Walking Horses (H. Rep. 94-1174, 94th Cong., 2d Sess. 4-7 (1976), *reprinted in* [1976] 3 U.S. Code Cong. & Ad. News 1698-1701).

Thus, the ALJ's decision is reversed, based upon the above analysis, and, upon the analysis submitted by Complainant in the "Complainant's Appeal Petition" (Dec. 27, 1991). The Horse Protection Act is just over 20 years old. This is the first time a respondent has argued that a soring determination made at the pre-show examination is insufficient to invoke the sanctions provided for in the Act unless an inference can be drawn that

the horse was also sore when the initial act of entering occurred. I reject that argument.

**A. Entry Is a Process That Begins with the Clerical Steps of Paying an Entry Fee and Sending in an Entry Form, and It Also Includes Pre-Show Inspection and Examination by the DQP and/or USDA Veterinarians.**

"The Horse Protection Act was adopted to further two public purposes: the altruistic one of protecting the animals from an unnecessary and cruel practice and the economic one of eliminating unfair competition from sored pseudo-champions that could fatally damage the Tennessee walking horse industry." *Thornton v. U.S. Dept. of Agriculture*, 715 F.2d 1508, 1511 (11th Cir. 1983) (*citing* H.R. No. 1174, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1699)). If the remedial purpose of this statute is to be achieved, it must be construed liberally, so as to give effect to its provisions. "Entering," within the meaning of the Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians. The entry of a horse within the meaning of the Act is also a status, such that once a person does any one, or all, of the steps in the process of entering that horse, it remains entered until it has finished showing or exhibiting. This position finds support in the regulations, as well as in the cases decided under the Act, and this construction of the term "entering" will best achieve the purpose of the Act.

In holding that the entry of a horse under the Act is completed prior to the pre-show inspection by the DQP and/or USDA veterinarians, the ALJ relied on *In re Gray*, 41 Agric. Dec.

253 (1982)[4]. Reliance on this case, however, is misplaced. The ALJ in *Gray* held that a horse is entered for purposes of showing at the time he is cleared after examination by the Show Steward and/or Show Veterinarian appointed by Management. *Id.* at 255. The Judicial Officer, in holding that this conclusion was erroneous, reasoned that the regulations "reveal an administrative construction that the act of entering the horse occurs before the horse is cleared by the Show Steward or Veterinarian." *Id.* at 255. Thus, entry begins with the clerical acts of sending in an entry form and a fee to the show's management. These actions take place prior to the time that the horse is cleared by the DQP, and are clearly a part of the entry process. It is not dispositive, however, on the issue of whether the examination by the DQP and/or USDA veterinarians is also a part of the entry process, as *Gray* simply stated one point in time during the entry process, and not at what point an entry has been concluded.

The entry process is discussed in *In re Holt*, 49 Agric. Dec. 853 (1990). The issue in *Holt* was whether a horse was sore on May 24, 1986, and therefore in violation of 15 U.S.C. § 1824(2)(B), which prohibits *entering* a horse while sore for the purpose of showing or exhibiting the horse at a horse show. It is important to note that May 24 was the show date, and consequently, the day of the pre-show inspection during which the horse was examined.

[4]Although the ALJ held that the horses involved in this matter were "entered in their respective shows before they receive their pre-show inspections" (Initial Decision at 8), he stated that "in some circumstances it might be proper to infer from a finding that the horse was sore at the pre-show examination, that the horse was sore when it was entered." He continued that "[s]uch an inference... might be appropriate if the examination is close in time to the horse's entry..." (Initial Decision at 9). This construction of the term "entering" would require a rule drawing an inference of soreness based on proximity in time to the clerical entry. Such a rule would be difficult to apply in practice, and additionally would lead to horse owners and trainers entering their horses far in advance of the show dates solely for the purpose of avoiding the mandates of the Act.

Thus, even the framing of the issue takes into account that entering a horse under the Act includes the pre-show inspection. Finding of Fact 6 states that on May 24, 1986, the horse was presented to the DQP for the pre-show examination, "thereby completing the procedures for entry to the show." *Id.* at 855-56. This finding of fact was then incorporated into the conclusions which held that "Holt... entered (Finding 6) 'High Tone Shaker' in the show of May 24, 1986. Accordingly, it is determined that he was in violation of the Act at 15 U.S.C.A. § 1824(2)(B)." *Id.* at 861. *Holt* also concludes that "[t]his illegal act was completed by Mr. Wall, who... was an assistant trainer engaged by Mr. Holt, acting under Mr. Holt's direction, and whose sole participation in the events of May 24, 1986, was to lead [the horse] to the pre-show inspection area." *Id.* at 861. *Holt* is indistinguishable from the case under consideration, and illustrates that entering, within the meaning of the Act, is a process and that it includes presentation for a pre-show examination.

The rationale in *Gray* for holding that an entry occurs before the horse is cleared was that a proper administrative construction of the term entering "is consistent with the ordinary usage of the term...." 41 Agric. Dec. at 255. This statement was made in reference to 9 C.F.R. § 11.20(b)(2),[5] which states that the show veterinarian shall examine the horses entered in any class. This rationale was stated, however, only for the purpose of refuting the ALJ's conclusion that a horse that does not pass the pre-show examination has not yet been entered. It does not interfere with the present construction that entering is a process, which begins with the payment of the fee and entry form, and includes the pre-show inspection.[6] The Horse Protection Act "is remedial

[5]Citations to the Code of Federal Regulations in this decision are to the 1988 edition. Non-substantive changes, insofar as this case is concerned, were made in 1988.

[6]Assuming *arguendo* that *Gray* and *Holt* are inconsistent, the more recent and more explicit holding in *Holt* would overrule *Gray*, *sub silentio*.

legislation which should be liberally construed to achieve the Congressional purpose in enacting the statute." *In re Stamper*, 42 Agric. Dec. 20, 49 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984). The regulations in their totality, therefore, read in conjunction with the legislative history of the Act, reveal that the proper construction of the term "entering" is that advanced by the Complainant and upheld in *Holt*.

The Act clearly specifies that the following actions, *inter alia*, are prohibited (15 U.S.C. § 1824(2)):

> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore....

In examining the regulations, it is apparent that pre-show inspection is a vital tool by which enforcement of the Act is to be achieved. 9 C.F.R. § 11.20(b)(2) states that "[t]he DQP shall physically inspect:... (ii) all Tennessee Walking Horses and racking horses entered in any animated gait class...[, and that] [s]uch inspection shall be for the purpose of determining whether any such horses are in violation of the Act or regulations." If a horse is found sore during pre-show, it will be excused from showing.[7] 9 C.F.R. § 11.20(B)(2) also outlines the inspection procedures for DQP's, and speaks specifically of pre-show inspection. If a finding of soreness made during the pre-show inspection is to be of any consequence, therefore, the pre-show inspection must fit into one of the three prohibited categories (i.e., showing, exhibiting, or entering). If it is not, enforcement of the Act will be seriously undermined. A finding that pre-show inspection is not

[7] There was testimony at the hearing that a horse is not allowed to enter the show ring without being examined by the DQP (Tr. 211).

a part of the entry process would create a window of opportunity for horse owners and trainers to present sored horses during the pre-show inspection with no consequences under the Act simply because it does not fit neatly into one of the prohibited categories.

A review of the regulations reveals that the pre-show inspection cannot be considered either "showing" or "exhibiting" within the meaning of the Act. In the first instance, 9 C.F.R. § 11.1(n) defines a horse exhibition as "a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides." The regulations define a horse show as "a public display of any horses, in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides." 9 C.F.R. § 11.1(m). Since the pre-show inspection is clearly not a "public display of horses," but is, instead, one of the steps that a horse must go through before it can be publicly displayed, it follows that pre-show inspection is not "showing" or "exhibiting" within the meaning of the Act. Further support for the position that the pre-show inspection is neither "showing" nor "exhibiting" is in *Gray, supra*, at 254. *Gray* involved a horse that had already entered the show ring, and was in the process of performing when its owner withdrew it upon sensing that something was wrong with the horse. The Judicial Officer rejected the A.L.J's holding that a horse is not shown if it does not complete its performance, and stated that "[t]here is nothing in the Act requiring that a horse complete the showing or exhibition to constitute 'showing or exhibiting,' within the meaning of the Act...." *Gray, supra*, at 254. The inference to be drawn here is that once a horse enters the ring, it is being shown or exhibited within the meaning of the Act. This illustrates that pre-show inspection is neither showing nor exhibiting, and it must then follow that it is a part of entering, as that term is used in the Act.

As most clerical entries are done prior to the actual show date, a holding that an entry under the Act is concluded after the clerical steps of entry are complete would result in the USDA veterinarians having to examine horses at the place where the horse is when this clerical entry occurs, in order to have a violation based on "entering a horse while sore." It is apparent in the regulations, however, that the pre-show inspection and examination for soreness was intended to be a function which takes place at the show grounds. For example, 9 C.F.R. § 11.4 provides (emphasis added):

> For the purpose of effective enforcement of the Act:
>
> (a) Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse *at any horse show*... shall allow any Veterinary Services representative to reasonably inspect such horse.... Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show,... being exercised *or otherwise on the grounds of, or present at, any horse show*....

Another illustrative section entitled *Inspection space and facility requirements* states that it shall be the responsibility of the management of the horse show to provide "[s]ufficient space in a convenient location to the horse show... in which horses may be physically... inspected." 9 C.F.R. § 11.6(a). Finally, 9 C.F.R. § 11.1(h) is instructive in that the title of the USDA veterinarians that perform examinations at the shows is a "Veterinary Services *Show* Veterinarian" (emphasis added). It is this person's responsibility to supervise and conduct the Department's activities under the Act *at any horse show*. 9 C.F.R. §§ 11.1(h), .6. Nothing in the Act suggests that any examination of horses for compliance with the Act should occur anywhere other than at a horse show. Further, any suggestion that exami-

nations should take place at any time prior to the actual show date (e.g., at the stable of the horse trainer on the day of the clerical entry, which could conceivably be weeks before the actual show) would create an extreme administrative burden on the Department, and would surely lead to widespread violation of the Act.

Even if the Department were prepared to handle such a task, there is no practical way that APHIS could know when someone was going to send in the entry form, and consequently, the horses would hardly ever be examined "when entered." Additionally, even if APHIS could know when the clerical entry was going to occur, and have an examination of the horse done at that time, it would be for naught. A trainer would simply enter his or her horse far in advance of the actual show, and be sure that the horse was not sore when examined at that time, but thereafter sore the horse, without recourse (unless a *post-show* examination detected soring), because of the knowledge that the entry, as construed by the ALJ, was completed prior to that time. The result, therefore, would be to render the "entering" portion of the Act meaningless. It is not enough to say that the consequence to the owner or trainer would be that the horse could be turned down for show or exhibition if found sore during the pre-show examination. Congress provided for sanctions more severe than that, and if a horse is found to be sore at the pre-show examination, those sanctions of civil penalty and disqualification should be applied.

The most compelling reason, perhaps, to hold that Complainant's construction of entry is correct, is that a finding of soreness made during pre-show examination has consistently been a sufficient basis upon which to find that a violation of "entering a horse while sore" has occurred. It has been stated that considerable respect is due "the interpretation given [a] statute

by the officers or agency charged with its administration.'" *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980) (*quoting Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)). *See also In re Leonberg*, 32 Agric. Dec. 763, 805 (1973) and *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1488 (9th Cir. 1984). Thus, the interpretation of "entering" urged by the administrative officials in this case is clearly consistent with previous decisions on this issue, and the Act, as thus interpreted, is not unconstitutionally vague.

### B. Mark's Ebony Ace, Delight's Big Toy, and This Is It Were Sore When Entered at Their Respective Shows.

It was correctly held by the ALJ: (1) that "Mark's Ebony Ace" was sore on June 17, 1988 (Initial Decision at 7, 10); (2) that "Delight's Big Toy" was sore on June 10, 1989 (Initial Decision at 7, 10); and, (3) that "This Is It" was sore on August 24, 1990 (Initial Decision at 7, 10). His holding on this point was based on the testimony of two USDA veterinarians, which was viewed as credible, that these three horses were sore.

It was stipulated that Dwaine Elliott presented "Mark's Ebony Ace" and "This Is It" to the DQP for pre-show inspection at their respective shows on June 17, 1988, and August 24, 1990 (Tr. 6, 7). It was also stipulated that Dwaine Elliott, through his employee John Odom, presented "Delight's Big Toy" to the DQP for pre-show inspection at the Gaston County Charity Horse Show on June 10, 1989 (Tr. 7).[9]

[9]It was also stipulated that (1) "on June 16th, 1988, Dwaine Elliott entered and paid the entry fee for Mark's Ebony Ace" (Tr. 6) that (2) "on August 6th, 1990, Dwaine Elliott entered and paid the entry fee for This Is It" (Tr. 6), and, that (3) "Dwaine Elliott on June 8th, 1989, paid the entry fee and entered the horse known as Delight's Big Toy" (Tr. 7). The ALJ's holding that the horses in this matter were entered prior to their inspections was based, in part, on this stipulation (Initial Decision at 8 n.2). The ALJ misinterpreted this stipulation. The Supreme Court has stated that "[i]f [a] stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative;

As found, pre-show inspection is a part of the entry process. These three horses, therefore, were still in the process of being entered at the time of their respective pre-show inspections. Accordingly, Respondent is in violation of § 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), which prohibits the entering of a horse, while sore, for the purpose of showing or exhibiting that horse.

### C. Respondent Should Receive a $6,000 Civil Penalty and a Disqualification Period of 15 Years.

The administrative officials recommend that the maximum civil penalty of $2,000 per count ($6,000 total) and a disqualification period of 5 years per count (for a total of 15 years) be imposed

since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917) (Where the record on appeal disclosed a statement contrary to that contained in a stipulation by the parties, the stipulation was held a nullity.) *See also Forest Hills Early Learning Center, Inc. v. Lukhard*, 661 F. Supp. 300, 309 (E.D. Va. 1987). Whether a horse has been entered is a legal conclusion, and the stipulation above merely states that Dwaine Elliott completed the clerical steps of entering the horses on those particular dates, and not that the entire entry process had been completed. It has also been stated that "[t]he intention of the parties in a trial stipulation is for the determination of the court from the language used in the entire agreement 'in light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues.'" *Mann v. Fender*, 587 S.W.2d 188, 202 (Tex. Civ. App. 1979) (*citing Texas Indemnity Ins. Co. v. Dunn*, 221 S.W.2d 922, 924 (Tex. Civ. App. 1949, no writ)). *See also Still v. Equitable Life Assur. Soc'y of United States*, 54 S.W.2d 1947, 951 (Tenn. 1932). The course of the examinations at the hearing shows that Complainant did not intend to stipulate to the legal conclusion that the entry was completed prior to the pre-show examination. If that had been the intention, it would have been fruitless to elicit from the witnesses evidence that the horses were found sore during the pre-show examination, as Complainant would not have proven its case by this evidence. Further, the only evidence of soreness that Complainant had was based on the pre-show examination. If it was Complainant's construction that an entry ended prior to this time, the Complaint would have reflected this by changing the allegation to *showing or exhibiting*, as opposed to entering, a sore horse. The pleadings allege, however, that Respondent *entered* the horses while sore, and this illustrates that Complainant did not stipulate to the completion of the entry of the horses on the dates contained in the stipulation.

upon Respondent for the serious violations in this case.[9] The knowledge of Mr. Elliott, the seriousness of the violations, and the Judicial Officer's adherence to a policy that comparable sanctions should be imposed for comparable violations, compel the imposition of the maximum civil penalty and a disqualification period. *In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983). The Judicial Officer has previously imposed a civil penalty of $2,000 and a disqualification period of 5 years upon a *knowledgeable* second-time violator. *In re Blades*, 40 Agric. Dec. 1725, 1730-32 (1981), *rev'd on other grounds*, 683 F.2d 280 (8th Cir. 1982).

The Act permits the Secretary to consider the following factors to determine the amount of a civil penalty (15 U.S.C. § 1825(b)(1)):

> [T]he nature, circumstances, extent and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matter as justice may require.

In most cases, the maximum civil penalty—$2,000 per violation—has been warranted. *Stamper*, 42 Agric. Dec. at 62. The violations in this case are extremely grave since this is exactly the type of inhumane and anti-competitive conduct that Congress intended to eliminate by the Act. H.R. Rep. No. 1174, 94th Cong., 2d Sess. 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1704-14. A trainer is not insulated from civil penalties because he lacked knowleddge or intent

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[9] The disqualification is from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction (15 U.S.C. § 1825(C)). The Department's sanction policy places appropriate weight upon the sanction recommendations of the administrative officials charged with enforcing the Act, and examines the nature of the violations in relation to the remedial purposes of the statute (*see In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (1991), *appeal docketed* No. 91-70169 (9th Cir. Mar. 8, 1991); *In re Palmer*, 50 Agric. Dec. 1762, 1790-91 (1991)).

of the horse's soring. *Stamper*, 42 Agric. Dec. at 44-57. It has been stated that a trainer is in the best position to sore a horse or to observe that using a chain on a horse is causing soreness. Full training responsibility, experience, skill, and close and regular contact with a horse while training for exhibition usually justify an inference that the trainer knew or should have known of the sensitive condition of the horse's forelegs. *In re Thornton*, 41 Agric. Dec. 870, 913 (1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983). Respondent Elliott has 26 years of experience with training walking horses, and trained the three horses involved in this case. Respondent had custody of the horses and knowledge of the methods and training devices utilized to prepare them for showing. He palpated the horses himself and had other do so prior to presenting the horses to the DQP. Therefore, he knew or should have known of the condition of the horses.

The ALJ took judicial notice of Respondent's prior offense (Tr. 9, 10). Previously, Mr. Elliott was assessed a civil penalty of $1,000 for exhibiting a horse while sore. *In re Purvis*, 38 Agric. Dec. 1271 (1979).

Because of the gravity of theses offenses, the culpability of Respondent, and his prior offense, a $2,000 civil penalty per count is justified.

The imposition of a period of disqualification is discretionary. However, a disqualification period had been recommended by APHIS, and the Judicial Officer has held that disqualification is an appropriate sanction in almost every Horse Protection Act case. In *In re Rowland*, the Judicial Officer noted (40 Agric. Dec. at 1951-52):

> Congress has provided the Department with the "tools" needed to eliminate the practice of soring Tennessee Walking Horses. But they must be used, to be effective. In order to achieve the Congressional purpose of the Act, it would seem necessary to

> impose at least the minimum disqualification provisions of the 1976 amendments on every horse owner (and trainer) who allows one of his horses to be exhibited while sore.[10]

Although the factors mentioned in determining the amount of a civil penalty need not be considered in deciding whether to impose a period of disqualification upon a violator, these factors do support such a penalty in this case. If a disqualification period is imposed, the minimum period for a second violation is 5 years. At the hearing, the ALJ took official notice of Respondent's prior adjudicated violation (Tr. 9, 10). Therefore, the violations in this case represent second, third and fourth violations by Mr. Elliott. Nothing in this case remotely justifies that no disqualification be assessed. To the contrary, Respondent Elliott is a habitual offender of the Act, and these serious and deliberate violations are worthy of severe sanctions. *See* Tr. at 218-23, 243. A 5-year disqualification period is imposed for each violation for a total of 15 years. These 5-year periods should run consecutively. This is a severe penalty, but it does not prevent a trainer from breeding horses. *Stamper*, 42 Agric. Dec. at 61. In fact, Mr. Elliott has some education and training in horse breeding (Tr. 296, 297). Thus, this disqualification is not the equivalent of a complete suspension order such as is imposed under other regulatory statues. *See In re Stamper*, 42 Agric. Dec. at 59. The disqualification provision was added by Congress in 1976 to provide a strong deterrent to subsequent violations by parties who had the economic means to pay the civil penalties as operation costs. H.R. REP. No. 1597, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706. Despite his previously being assessed a civil penalty, Respondent Elliott has continued to violate the Act. Failure to severely discipline him will send the wrong message to other trainers in the industry.

[10] "...I can envisage no circumstance presently warranting an exception from this policy.

It is held that "entering" is a process through which a horse is placed in the status of being entered or is caused to remain in that status, and that whenever a horse is found to be sore at any point in the entry process, any person or persons who caused or allowed the horse to be entered are subject to sanctions under the Act.

Accordingly, I find that William Dwaine Elliott: (1) was in the process of entering "Mark's Ebony Ace" on June 17, 1988, at the East Tennessee Walking Horse Classic at Gray, Tennessee, while the horse was sore; (2) was in the process of entering "Delight's Big Toy" on June 10, 1989, at the Gaston County Charity Horse Show at Dallas, North Carolina, while the horse was sore; and (3) was in the process of entering "This Is It" on August 24, 1990, at the Tennessee Walking Horse National Celebration at Shelbyville, Tennessee, while the horse was sore. Accordingly, Respondent William Dwaine Elliott is found in violation of section 5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)).

For the foregoing reasons, the following Order should be issued.

## Order

1. Respondent Dwaine Elliott is assessed a civil penalty of $6,000 for violations of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)), which shall be paid within 60 days after service of this Order by certified check or money order, made payable to the Treasurer of the United States, and sent to Ms. Norma J. Morgan, United States Department of Agriculture, Office of the General Counsel, Room 2014-South Building, Washington, D.C. 20250-1400.

2. Respondent Dwaine Elliott is disqualified for 15 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction

The provisions of the disqualification Order shall become effective on the 30th day after service of this Order on Respondent.

Done at Washington, D.C.
May 14, 1992

Donald A. Campbell
Judicial Officer

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

FILED
April 26, 1993

No. 92-1662
91-122-HPA
90-20-HPA

WILLIAM DWAINE ELLIOTT,

*Petitioner,*

v.

ADMINISTRATOR, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES OF AMERICA,

*Respondents.*

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O R D E R

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Petitioner has filed a petition for rehearing.
The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague
CLERK

## U.S. Constitution Amendment V

### ADMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## U.S. Constitution art. I, § 9, cl. 3

### Section 9, Clauses, Bills of Attainder and Ex Post Facto Laws

No Bill of Attainder or ex post facto Law shall be passed.

## 15 U.S.C. 1821–1831

### CHAPTER 44—PROTECTION OF HORSES

Sec.

1821. Definitions.
1822. Congressional statement of findings.
1823. Horse shows and exhibitions.
(a) Disqualification of horses.
(b) Prohibited activities.
(c) Appointment of inspectors; manner of inspections.

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1826. Notice of violations to Attorney General.
1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting States; technical and other nonfinancial assistance to States.
1828. Rules and regulations.
1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action.
1830. Report to Congress.
1831. Authorization of appropriations.

**§ 1821. Definitions**

As used in this chapter unless the context otherwise requires:

**(1)** The term "management" means any person who organizes, exercises control over, or administers or who is responsible for organizing, directing, or administering.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "sore" when used to describe a horse means that —

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(Pub.L. 91-540, § 2, Dec. 9, 1970, 84 Stat. 1404; Pub.L. 94-360, § 3, July 13, 1976, 90 Stat. 915.)

## § 1822. Congressional statement of findings

The Congress finds and declares that —

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

(Pub.L. 91-540, § 3, Dec. 9, 1970, 84 Stat. 1405; Pub.L. 94-360, § 4, July 13, 1976, 90 Stat. 915.)

## § 1823. Horse shows and exhibitions

### Disqualification of horses

(a) The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

### Prohibited activities

(b) The management of any horse sale or auction shall prohibit the sale or auction or exhibition for the purpose of sale of any horse (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations

under subsection (c) of this section or by the Secretary that the horse is sore.

**Appointment of inspectors; manner of inspections**

**(c)** The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

**Recordkeeping and reporting requirements; availability of records**

**(d)** The management of a horse show, horse exhibition, or horse sale or auction shall establish and maintain such records, make such reports, and provide such information as the Secretary may by regulation reasonably require for the purposes of implementing this chapter or to determine compliance with this chapter. Upon request of an officer or employee duly designated by the Secretary, such management shall permit entry at all reasonable times for the inspection and copying (on or off the premises) of records required to be maintained under this subsection.

**Inspection by Secretary or duly appointed representative**

**(e)** For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

(Pub.L. 91-540, § 4, Dec. 9, 1970, 84 Stat. 1405; Pub. L. 94-360, § 5, July 13, 1976, 90 Stat. 916.)

## § 1824. Unlawful acts

The following conduct is prohibited:

**(1)** The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

**(2)** The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or

horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

**(3)** The failure by the management of any horse show or horse exhibition, which does not appoint and retain a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse which is sore.

**(4)** The failure by the management of any horse sale or auction, which does not appoint and retain a qualified person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse which is sore.

**(5)** The failure by the management of any horse show or horse exhibition, which has appointed and retained a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse (A) which is sore, and (B) after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore.

**(6)** The failure by the management of any horse sale or auction which has appointed and retained a person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse (A) which is sore, and (B) after having been notified by such person or the Secretary or after otherwise having knowledge that the horse is sore.

**(7)** The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction, the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse

exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under Section 1828 of this title prohibits to prevent the soring of horses.

**(8)** The failing to establish, maintain, or submit records, notices, reports, or other information required under section 1823 of this title.

**(9)** The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

**(10)** The removal of any marking required by the Secretary to identify a horse as being detained.

**(11)** The failure or refusal to provide the Secretary with adequate space or facilities, as the Secretary may by regulation under section 1828 of this title prescribe, in which to conduct inspections or any other activity authorized to be performed by the Secretary under this chapter.

(Pub.L. 91-540, § 5, Dec. 9, 1970, 84 Stat. 1405; Pub.L. 94-360, § 6, July 13, 1976, 90 Stat. 916.)

## § 1825. Violations and penalties

### Criminal acts and penalties

**(a)(1)** Except as provided in paragraph (2) of this subsection, any person who knowingly violates section 1824 of this title shall, upon conviction thereof, be fined not more than $3,000, or imprisoned for not more than one year, or both.

**(2)(A)** If any person knowingly violates section 1824 of this title, after one or more prior convictions of such person for such a violation have become final, such person shall, upon conviction thereof, be fined not more than $5,000, or imprisoned for not more than two years, or both.

**(B)** Any person who knowingly makes, or causes to be made, a false entry or statement in any report required under this chapter; who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and maintained by any person or in any notification or other information required to be submitted to the Secretary under section 1823 of this title; who knowingly neglects or fails to make or cause to be made, full, true, and correct entries in such accounts, records, memoranda, notification, or other materials; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly mutilates, alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit any such documentary evidence to the Secretary for inspection and copying shall be guilty of an offense against the United States, and upon conviction thereof shall be fined not more than $5,000, or imprisoned for not more than three years, or both.

**(C)** Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punishable as provided under sections 1111 and 1112 of Title 18.

**Civil penalties; review and enforcement**

**(b)(1)** Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more

than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of Title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

**Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

**Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction**

**(d)(1)** The Secretary may require by subpena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

**(2)** The attendance of witnesses, and the production of books, papers, and documents, may be required at any designated place from any place in the United States. In case of disobedience to a subpena the Secretary, or any party to a proceeding before the Secretary, may invoke the aid of any appropriate district court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this chapter.

**(3)** The Secretary may order testimony to be taken by deposition under oath in any proceeding or investigation pending before him, at any stage of the proceeding or investigation. Depositions may be taken before any person designated by the Secretary who has power to administer oaths. The Secretary may also require the production of books, papers, and documents at the taking of depositions.

**(4)** Witnesses whose depositions are taken and the persons taking them shall be entitled to the same fees as paid for like services in the courts of the United States or in other jurisdictions in which they may appear.

**(5)** In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

**(6)** The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in subsection (b) of this section.

**Detention of horses; seizure and condemnation of equipment**

**(e)(1)** The Secretary may detain (for a period not to exceed twenty-four hours) for examination, testing, or the taking of evidence, any horse at any horse show, horse exhibition, or horse sale or auction which is sore or which the Secretary has probable cause to believe is sore. The Secretary may require the temporary marking of any horse during the period of its detention for the purpose of identifying the horse as detained. A horse which is detained subject to this paragraph shall not be moved by any person from the place it is so detained except as authorized by the Secretary or until the expiration of the detention period applicable to the horse.

**(2)** Any equipment, device, paraphernalia, or substance which was used in violation of any provision of this chapter or any regulation issued under this chapter or which contributed to the soring of any horse at or prior to any horse show, horse exhibition, or horse sale or auction, shall be liable to be proceeded against, by process of libel for the seizure and condemnation of such equipment, device, paraphernalia, or substance, in any United States district court within the jurisdiction of which such equipment, device, paraphernalia, or substance is found. Such proceedings shall conform as nearly as possible to proceedings in rem in admiralty.

(Pub.L. 91-540, § 6, Dec. 9, 1970, 84 Stat. 1466, Pub.L. 94-360, § 7, July 13, 1976, 90 Stat. 918.)

**9 CFR 1120**

**(2)** The DQP shall physically inspect:

(i) All Tennessee Walking Horses and racking horses entered for sale or auction, (ii) all Tennessee Walking Horses and racking horses entered in any animated gait class (whether under saddle, horse to cart, or otherwise), (iii) all Tennessee Walking Horses and racking horses entered for exhibition before they are admitted to be shown, exhibited, sold, or auctioned, and (iv) all Tennessee Walking Horses and racking horses tied first in their class or event at any horse show, horse exhibition, horse sale, or horse auction. Such inspection shall be fore the purpose of determining whether any such horses are in violation of the Act or regulations. Such physical examination may be conducted in any manner deemed necessary by the DQP in order to determine whether any such horses re sore. The DQP shall observe horses in the warmup ring and during actual performances whenever possible, and shall inspect any Tennessee Walking Horse or racking horse at any time he deems necessary to determine whether any such horse shown, exhibited, sold, or auctioned is in violation of the Act or regulations. If present at other shows, he shall examine any horse which he determines should be examined for compliance with the Act and regulations.

**9 CFR 11.4**

**ff 11.4 Inspection and detention of horses**

For the purpose of effective enforcement of the Act:

**(a)** Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any Veterinary Services representative to reasonably inspect such horse at all reasonable times and places the Veterinary Services

representative may designate. Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show, exhibition, or sale or auction, being exercised or otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction, whether or not such horse has or has not been shown, exhibited, or sold or auctioned, or has or has not been entered for the purpose of being shown or exhibited or offered for sale or auction at any such horse show, horse exhibition, or horse sale or auction. Veterinary Services representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations, such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with Department inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by a Veterinary Services representative.

## CERTIFICATE OF SERVICE

I, Philip L. Whitson, counsel for the Petitioner, William Dwaine Elliott, do hereby certify that this 21st day of July, 1993, that three (3) true and exact copies of the foregoing Petition for Writ of Certiorari were served upon each of the following counsels of record by placing same in a United States Mailbox with sufficient first-class postage prepaid and affixed thereto and addressed as follows:

(1) Leslie K. Lagomarcino
Attorney at Law
Counsel of Record for the Respondent
United States Dept. of Agriculture
Office of the General Counsel
Litigation Division
14th Independence Ave., SW
Room 2036
Washington, DC 20250-1400; and

(2) Solicitor General
Department of Justice
Washington, DC 20530

Further, all parties required to be served in this case have been served.

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